In regard to this third, or middle sort of trust, the tendency of the court seems to be to remove a trustee for hostility, although there is much *dictum* to the contrary. It would seem on reason that he ought to be removed, for a law that keeps a person whom you distrust and who is unfriendly in charge of the investing and care of your money, is a bad law. True, a court of equity scrutinizes the accounts submitted at intervals, but, then, who would care to have his watch in the possession of one he esteemed a thief, even had that thief to exhibit it to a magistrate every single day? The position of the owner in such instances is little less than intolerable, and that of a *cestui que trust,* who doubts the ability or honesty of the one who has all his worldly goods in charge, is far worse. It would seem far better that this *cestui* should have a right to choose between two trustees, both considered competent in law, by removing one and substituting the other, when he can thereby exchange anxiety for peace of mind and his affairs may be protected to his satisfaction and that of a court of equity.

In *Letterstedt* v. *Broers,*[16] the English court took a very human view of the question. It rather questioned how one could wish to continue as trustee when the real owner did not want such a one handling his affairs. The opinion suggested that, if the trustee did not have the delicacy to resign, the court would have to supply it for him. It would almost appear that a desire to hold on in spite of the wishes of mature beneficiaries was evidentiary of something a little wrong, but no court has held that way, save that in a case, tried a few days before the death of the Earl of Nottingham, that Lord Chancellor removed a trustee and thundered: "I like not that a man should be ambitious of a trust." [17]

B. C.

EFFECT OF COMBINING GENERAL AND SPECIAL APPEARANCE IN THE FEDERAL COURTS.—The overwhelming weight of authority in former years held to the doctrine that a special appearance and a general appearance cannot be combined, but the latter is a waiver of the former, so that the defendant cannot unite a plea to the merits, or even a general demurrer, with an objection to venue.[1]

A leading case on this subject is *Jones* v. *Andrews,*[2] in which case the defendant appeared and objected to the venue of the action, and at the same time pleaded to the merits. It was held that the plea to the merits amounted to a waiver of venue, and the defendant was held as on a general appearance. Again in *Bluefields S. S. Co.* v. *Steele,*[3] the objection to the venue of a suit

[16] 9 App. Cas. 371.
[17] Uvedale *v.* Ettrick, 2 Ch. Cas. 130.
[1] HUGHES, FEDERAL PROCEDURE, 2nd. ed., p. 265; Dobie, "Venue in the United States District Court," 2 VA. LAW REV. 1, 9.
[2] 10 Wall. 327.
[3] 184 Fed. 584.

between citizens of different States, because neither of the parties was a resident of the district wherein the court sat, was held to be waived by the defendant by appearing and filing a motion to vacate an order on grounds going to the merits of the bill as well as for want of jurisdiction over the persons.

Although there are comparatively recent cases holding to the waiver doctrine,[4] the trend of modern authority seems to favor the contrary view. Thus the rule is laid down, "that when an objection to the jurisdiction over the person of the defendant is filed with a formal appearance, the latter will be considered to be special and not general, and that a party may file a special appearance with an objection to the jurisdiction over his person joined with other objections, such as a want of equity, or want of jurisdiction over the subject-matter of the suit, without submitting to the jurisdiction of the court." [5] This seems on principle to be the sounder doctrine. Special appearance is, it is true, a privilege conferred by statute, but, unless the statute granting the privilege restricts the grant by prohibiting a plea to the merits to be entered with a plea to the venue, to hold the former a waiver of the latter seems to give a technicality of procedure undue preference over both convenience to the courts and litigants and justice to the objecting party.

The leading case holding to the modern doctrine is *Wood* v. *Wilbert*.[6] This case lays down the rule that where a defendant files a formal appearance and simultaneously files an exception to the jurisdiction over his person, the two papers should be considered together, and as such cannot be regarded as a consent to submit to the jurisdiction in a case where consent is necessary.[7]

In *Southern Pacific Co.* v. *Arlington Heights Co.*,[8] it was decided that where the subject-matter of an action is within the ju-

[4] St. Louis, etc., R. Co. *v.* McBride, 141 U. S. 127; Campbell *v.* Johnson, 167 Fed. 102; Lehigh Valley Coal Co. *v.* Washko, 231 Fed. 42; Lukosewicz *v.* Phila. & R. Coal Co., 232 Fed. 292; Enright *v.* Heckscher, 240 Fed. 863.

[5] 1 FOSTER, FEDERAL PRACTICE, 6th. ed., pp. 980, 981, and cases cited.

[6] 226 U. S. 384.

[7] In Wood *v.* Wilbert, *supra*, the question of combining general and special appearance was put to issue thus: The defendant in the court below entered a special appearance objecting to the venue, and at the same time filed a demurrer on the ground that the court did not have jurisdiction of the subject-matter, since consent of the defendant was necessary to confer jurisdiction under § 70 (e) of the Bankruptcy Act. It was contended in the court below that the appellees, by entering a general appearance, waived their right to object to the venue and thereby consented to the jurisdiction of the court. The lower court overruled this contention. Error was assigned and the case came to the Supreme Court on the point of jurisdiction. The Supreme Court held that it did not have jurisdiction over the cause, since it did not have the necessary consent of the appellees; in other words, the general appearance was *not* a waiver of the special appearance, and consent of the appellees could not be presumed therefrom.

[8] 191 Fed. 101.

risdiction of the federal court, the right of a defendant to be sued only in the district of his residence when given by statute is a personal privilege which he may waive, and does waive by a general appearance; but that it is not so waived where he makes a special appearance for the express purpose of challenging the jurisdiction over his person on that ground, although he may have combined with his motion or plea to the venue matter going to the subject of the suit, as that it is not within the jurisdiction of the court of equity to determine the cause as presented by the bill. Wolverton, J., in delivering the opinion of the court, said:

> "Where the appearance is declared in unmistakable language to be special, the pleader's intendment that it is not so is not always to be deduced from the fact of the combination of an objection to the jurisdiction with an objection to the subject-matter. Of course, the court cannot pass judgment upon the subject-matter without at the same time having jurisdiction of the person, yet if the defendant insists upon his objection to the jurisdiction over his person, and he is in a position to insist thereon, the court ought to give him the benefit of that objection and pass judgment respecting it."

Some State courts have gone so far as to hold that where the defendant appears specially to object to the jurisdiction over his person, and the objection is overruled, he must elect whether to stand on his objection or plead to the merits, and by doing the latter he waives the former.[9] But the better opinion seems to be otherwise, holding that a plea to the merits, after an objection to the venue has been overruled, does not constitute a waiver of the objection.[10]

Of course, where the action is of a local nature, which by Judicial Code, § 55 (Comp. Stat. '16, § 1037) must be brought in the district where the property is situated, neither consent of the parties nor assumption of jurisdiction can confer jurisdiction on the court of another district.[11]

E. M. P.

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[9] DeJarnette *v.* Dreyfus, 166 Ala. 138, 51 So. 932; Corbett *v.* Physicians' Casualty Ass'n, 135 Wis. 505, 115 N. W. 365.

[10] Southern Pacific Co. *v.* Denton, 146 U. S. 202; Budris *v.* Consolidation Coal Co., 251 Fed. 673; 6 VA. LAW REV. 597 and cases cited.

[11] Matarazzo *v.* Hustis, 256 Fed. 882.